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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, District Judge

NEXTDOOR.COM, INC.)
)
Plaintiff,)
)
VS.) NO. C12-5667 EMC
)
ABHYANKER, et al.,)
)
Defendant.)
)

SAN FRANCISCO, CALIFORNIA
THURSDAY, DECEMBER 12, 2013

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING

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1 Thursday - December 12, 2013

11:31 a.m.

2 P R O C E E D I N G S

3 ---oo---

4 THE CLERK: Calling case C12-5667; Nextdoor v.
5 Abhyanker.

6 Counsel, please come to the podium and state your name for
7 the record.

8 MR. PULGRAM: Good morning, your Honor. Laurence
9 Pulgram for plaintiff and counter-defendant, Nextdoor.com; and
10 counter-defendant, Janakiraman.

11 THE COURT: Thank you, Mr. Pulgram.

12 MS. KELLY: Jennifer Kelly on behalf of the same
13 plaintiffs.

14 MS. NORTON: Heather Norton on behalf of Raj
15 Abhyanker.

16 THE COURT: Thank you, Ms. Norton.

17 MR. WALIA: Good morning, your Honor. Harpreet Walia
18 appearing on behalf of codefendants, Sandeep Sood and Monsoon
19 Enterprises.

20 THE COURT: Thank you, Mr. Walia.

21 MR. RAWLINSON: Matt Rawlinson on behalf of
22 Benchmark.

23 THE COURT: Thank you, Mr. Rawlinson.

24 So I issued the order this morning that you've received
25 granting Mr. Abhyanker's motion for leave. And knowing that a

1 number of -- gone through several iterations, but the scope of
2 the counterclaim has been narrowed to some degree.

3 But I think what I want to do is talk about how we -- what
4 the next step is and how we move this thing along.

5 And it seems like the first issue is this question about
6 whether we should put on a schedule -- an expeditious hearing
7 on the adequacy of the Trade Secret Claim; is that --

8 MR. PULGRAM: Your Honor, that is our position at
9 Nextdoor. And our sense on this -- and you've probably noticed
10 this morning also there was an amended Trade Secret disclosure
11 filed; a second amended. One of the three Trade Secrets
12 identified has been withdrawn. That was the Source Code.

13 THE COURT: Yeah.

14 MR. PULGRAM: And so we have these two left that we
15 believe are not secrets; they're public. They haven't been
16 adequately disclosed because they aren't secrets. And we think
17 the best way to go about addressing them is by a motion for
18 judgment on the pleadings and or Rifle Shot summary judgement
19 where we would say this is public. These are facts that are in
20 possession of the plaintiffs. Nothing we need to have
21 discovery about. We don't have to get into, quote, the
22 adequacy of the designations as much as disposition of the
23 claim.

24 We think that we can do that on a motion for judgment or on
25 the pleadings. Or, as I said if necessary, we would put in

1 Rifle Shot facts and we request an exception from the One
2 Summary Judgment Rule.

3 I think one other advantage of that is five of the six
4 counter-defendants are only on the Trade Secret Claim. And we
5 could get rid of all those counter-defendants and I think we
6 can do all of that quite quickly.

7 THE COURT: How long will it take you to get such a
8 motion on file?

9 MR. PULGRAM: We could do it within a matter of a few
10 weeks. And Mr. Rawlinson, who has got a client with some of
11 the same defenses -- but more because he hasn't answered at all
12 yet -- also has an initial response to the complaint that's
13 due. I can't speak for him.

14 MR. RAWLINSON: Yes, your Honor. We have an
15 agreement with defendant, counter-plaintiff.

16 When we were served at about the time that they requested
17 leave to file the complaint that your Honor ruled on today --
18 and partly because of the history both in the State Court and
19 this Court -- we said we've now filed a number of motions to
20 dismiss and each time it gets superseded by a new complaint.

21 We'd like to know what target we're shooting at and so we
22 agreed we'd file our motion to dismiss 21 days after your
23 Honor's ruling on the motion for leave.

24 So it's currently due, I think, on January 2nd; unless
25 there's a dispute on that. We can probably file it more

1 quickly.

2 But the basis for our motion is primarily -- although, it
3 may involve some of the same issues that Nextdoor just brought
4 up. When the original complaint in this matter was filed,
5 there was a Contract Claim against us; which is the basis, I
6 think, for the idea that there was any duty of confidentiality
7 by Benchmark at all.

8 We wrote a motion to dismiss and filed it in the Court that
9 said no, that's not a valid contract; Statute of Clause, etc.,
10 etc. And then that issue was never ruled on by the Court
11 because Mr. Abhyanker filed an amended complaint which removed
12 the Contract Claim and just asserted the Trade Secret Claim.

13 We think it's a legal issue that was not addressed in your
14 Honor's prior motion to dismiss about whether you can avoid the
15 Statute of Clause issue just by calling it a Trade Secret Claim
16 if the underlying duty is just a Contract Claim; an asserted
17 oral contact.

18 We also think in light of the pleadings that have been
19 filed; as I understand it, the only two Trade Secrets that are
20 now asserted are one of bidding history on the term
21 Nextdoor.com, which you've already held is not a trade -- the
22 term is not a Trade Secret and the Laurel Line (phonetic)
23 neighborhood. I'm not sure either of those is a Trade Secret.

24 I need to do the research on whether I can properly file
25 that on a motion on the pleadings in light of how they were

1 disclosed, but I might add that issue to the motion as well.

2 It's currently due January 2nd.

3 I do have one other issue. Not to burden your Honor, but
4 I'm a little concerned. I know the parties submitted their
5 proposed dates that Mr. Abhyanker has proposed a January 12th
6 or January 13th, 2014 deadline for further amendments to the
7 pleadings. I found that a little bit puzzling because you just
8 ruled on the second amended complaint.

9 And I'm a little bit concerned I'm being set up for the
10 third or fourth time where I file my motion to dismiss only to
11 have it superseded by yet another complaint.

12 I guess I would ask Mr. Abhyanker's counsel here today; you
13 know, what's the purpose of yet another date for amendment on
14 the pleadings and is there some contemplated amendment and
15 should we coordinate that with whatever motions the parties are
16 going to file?

17 THE COURT: Yeah, I think that's a fair question.

18 MS. NORTON: There's no plans to further amendment
19 the pleadings. When we were coming up with this schedule, we
20 received this schedule from Nextdoor.com first and they
21 included a date to amend the pleading. And we also included a
22 date just to be consistent with the rest of the calendar, but
23 we're fine with moving that forward.

24 THE COURT: Nobody plans to amend pleadings at this
25 point? Or I'm just going to delete that. We don't need that.

1 If someone wants to seek leave to amend, you'll have to go by
2 Rule 15; but otherwise, I'm not going to anticipate -- I'm not
3 gonna --

4 MR. RAWLINSON: In terms of timing, your Honor, we
5 can certainly file January 2nd. I wouldn't mind another week
6 just so I don't have to make --

7 THE COURT: It makes sense to coordinate all these.
8 I don't want to get it ad seriatim. I'd rather have one
9 consolidated hearing on this since there's going to be some
10 overlap.

11 MR. PULGRAM: There is. And there's one other issue,
12 which you'll remember from the discussion we had about
13 amendment of the complaint. And Mr. Abhyanker advised that he
14 was attempting to plead a Common Law Trademark Claim on
15 Nextdoor and our position was he hasn't plead any Use in
16 Commerce that can support such a claim. I was going to suggest
17 until your order preceded me here today by being entered.

18 But rather than us making a motion to dismiss on that basis
19 and they're saying oh, we've got more facts that we could
20 plead, that the plaintiffs actually identify what it is that
21 they claim is their Commercial Use in Commerce that can
22 establish priority of use in the name Nextdoor.

23 The current pleading has general allegations at paragraphs
24 161 and 162 that include a lot of things that can't possibly be
25 Use that would be priority of Use here. And they don't

1 identify any actual Use in Commerce.

2 Putting the word "Nextdoor" on your name site -- or your
3 website as one line is not a Use in Commerce that can designate
4 origin. So that's what I was going to suggest, but your Honor
5 already entered the order.

6 I suppose if I were going to trouble you with that, I would
7 say it would make sense to say to the plaintiffs within seven
8 days, identify the specific Uses in Commerce that you contend
9 support priority of Use and attach the exhibits that show them;
10 otherwise, I'm afraid we're going to keep punching at clouds as
11 we have so far.

12 THE COURT: The other way to do this is to include
13 that as a partial motion for summary adjudication then on that
14 particular element. You believe that they failed to have any
15 evidence of that element. And rather than doing this as
16 motions to dismiss or statements with pleadings, let's just
17 handle it as an adjudication.

18 MR. PULGRAM: Well, we can; but what we are going to
19 have to do in that case is continue to produce the discovery
20 we're having the disputes over where they claim they've got
21 something that would demonstrate Use and we haven't seen it.

22 And so until we get through with all that discovery -- my
23 view on the pleading was if they would just say what it is that
24 purported to establish that Use, then we'd know whether or not
25 that's something that could potentially state a claim.

1 But I don't think we're in a position to do a summary
2 judgment motion on that. I think if they actually stood up
3 straight and tall and said this is where we claim we Use that,
4 then we'd have no motion to dismiss on.

5 THE COURT: Well, what's your -- let me hear from --
6 from you. What is the alleged -- what's your response to the
7 Commercial Use?

8 MS. NORTON: Our view is this was something that
9 would be more appropriate to motion practice, but it is part of
10 the operative pleading now.

11 And if they want to challenge that pleading, it would be
12 better dealt with through a motion to dismiss or a summary
13 judgment motion rather than deviating from the normal
14 procedures and requiring some statement within a certain number
15 of days.

16 THE COURT: Well, that is the subject, I take it, of
17 discovery at this point. Is there a contention interrogatory?

18 MR. PULGRAM: There is and there's all the document
19 issues that are in the pleading here.

20 What I think that it would take would be an addition of two
21 sentences to the amended order by your Honor that they're
22 permitted leave to amend as you've permitted, but they're
23 directed to state the specific uses and the dates and attach
24 those uses on which they claim priority.

25 It's a one-sentence addition, which I think is a completely

1 reasonable request for your Honor to make at this point where
2 we're at round four of the pleadings.

3 THE COURT: Right. Let me ask --

4 MR. PULGRAM: We don't want to go around anymore.

5 THE COURT: -- what objection do you have to that
6 proposal? I mean, you have the information so it's not like
7 you need discovery rather than -- I understand this is a little
8 different and I would be requiring some degree of specificity
9 and I could do that under the Rubric of Plausibility under
10 *Iqbal* and *Twombly* if I wanted to; but as a practical matter,
11 what's -- why not?

12 MS. NORTON: If that's the way your Honor wishes to
13 proceed, then we wouldn't have an objection.

14 THE COURT: All right. Then we at least get that
15 issue at least off the table at this pleading stage.

16 MR. PULGRAM: Exactly.

17 THE COURT: And then we go on to other stuff.

18 MR. PULGRAM: Either we'll have a motion or we won't.
19 Exactly. And --

20 THE COURT: All right. Then I will order that the --
21 I amend my order orally here to require Mr. Abhyanker to
22 identify the prior commercial use.

23 Now, you're suggesting that documentation be attached to
24 that?

25 MR. PULGRAM: The Trademark. I mean, it has to

1 actually have been a mark. There must be a picture.

2 THE COURT: All right. I think that's a fair request
3 and I'd do that under the Plausibility Requirements of *Iqbal*
4 and *Twombly* that such Use -- any documentation of such Use be
5 attached. And we'll call it a -- just -- we have to amend the
6 complaint again. And I don't want another -- third or whatever
7 -- fourth, but just call it a supplement to the complaint.

8 And how long will you need to do that, Counsel?

9 MS. NORTON: My schedule -- I know that the holidays
10 are approaching and my client has some travel plans. I think
11 if we said two weeks, that would probably be safe.

12 THE COURT: Okay. All right. Within two weeks,
13 supplementation of the counterclaim to identify the prior
14 Commercial Use and any exhibits thereto.

15 MR. PULGRAM: But that would take us to the 26th.
16 And I think within two weeks after that, we could probably file
17 our motions. And I think we'll file a judgment on the
18 pleadings and or summary judgment on the Trade Secrets and we
19 could also -- if we have a motion on the pleadings on the
20 Trademark, we'll add that; but if we don't, we'll answer.

21 THE COURT: All right.

22 And with respect to your question about you think it's more
23 appropriate to have a targeted summary judgment motion without
24 exhausting potential summary judgment motions on the larger
25 questions. I'm inclined to do that because we have a discrete

1 issue I and don't want to lock ourselves in; if for some
2 reason, it can't be resolved by a judgment on the pleadings;
3 but could be resolved by a summary judgment process. So I
4 think that I will make an exception -- one exception for that,
5 but I don't want a whole series of summary judgment motions.

6 MR. PULGRAM: Thank you, your Honor.

7 THE COURT: But it's targeted enough and makes sense
8 to advance the litigation and I think we need to resolve that.

9 I know there's questions about getting discovery, but I
10 think we ought to resolve that before opening discovery on the
11 question of Trade Secrets so that portion of discovery will
12 continue to be deferred until we resolve the motion.

13 You going to file that motion along with the -- your
14 motion? What's the date?

15 MR. PULGRAM: January 9th.

16 THE COURT: With respect to these other discovery
17 issues that are impending, I'm not sure what the problem is
18 here.

19 I mean, I've seen your little -- your summaries. The first
20 question is the adequacy of the search for responsive
21 documents. And that Nextdoor is asking for some specificity as
22 to that search process; is that correct, Mr. Pulgram?

23 MR. PULGRAM: Yes, your Honor.

24 THE COURT: And -- which is sometimes ordered. It
25 doesn't seem to be too onerous just to identify what the

1 processes were.

2 Is there an objection to that?

3 MS. NORTON: No, there's no objection.

4 The issue is that this wasn't raised prior to our meet and
5 confer so we weren't able to properly meet and confer about the
6 issue.

7 And we're, frankly, not quite sure why the adequacy of our
8 production is being called into question, but we would -- we've
9 already offered to agree on a list of search terms if they
10 wanted to provide us with the list or to hash out together a
11 list of search terms to make sure that all the basis are
12 covered. We offered to do that and didn't hear a response back
13 on that.

14 THE COURT: They also wanted to know what
15 repositories were looked at to make sure that -- it seems to be
16 that's a -- that's not overly onerous and I think that's a fair
17 request.

18 With respect to the second issue; producing a copy of the
19 due diligence CD or package provided at Benchmark; I understand
20 that the concern is there may be some sensitive information in
21 there. But if this is done under a protective order, I'm not
22 sure what the -- why that wouldn't --

23 MS. NORTON: Our confusion is that our
24 understanding -- and I think your Honor just confirmed it -- is
25 that discovery on Trade Secret is not yet open and that CD

1 really is on the issue of Trade Secrets.

2 I know that Nextdoor maintains that it has Trademark
3 implications as well, but they mention that the Trademark on a
4 confidential CD provided in a pitch is not actually Use of the
5 mark. So the CD was really a Trade Secret CD. And if
6 discovery is not mutually open on that issue right now, then we
7 think it's appropriate to --

8 THE COURT: Right. Is there any objection to
9 deferring this item until we resolve the Trade Secret question?

10 MR. PULGRAM: So their allegation specifically said
11 that the CD included business plans, Trademarks, and mockups
12 with the word "Nextdoor" in the upper left-hand side. So
13 they've identified the CD as including Trademark stuff.

14 But second, I'm not interested in going into a lot of other
15 Trade Secret discovery at this point; but the reason we have a
16 hold on Trade Secret discovery until a plaintiff or a claimant
17 can identify the Trade Secret is so they don't start rummaging
18 around without having any claim.

19 And generally, it's a one-way blockade. I'm not trying to
20 break down the blockade in general; I'm -- we're fine deferring
21 the discovery on that overall, but denied a CD that they first
22 say they didn't have at all and now say oh, we want to pull
23 those things that we think are relevant to Trademark and not
24 give you the rest of. I'm not sure why they don't just give it
25 to us. I think this is to hide --

1 THE COURT: So what's the harm in -- I mean,
2 Trademark -- Trade Secret discovery -- assuming that the claim
3 stays in -- is going to be opened up soon anyway. And if this
4 has -- I don't know what portion of this contains Trade
5 Secret -- relates to the Trade Secret Claim as opposed to
6 Trademark and everything else.

7 MS. NORTON: Our view is that the entire CD relates
8 just to the Trade Secret Claim because this is the pitch that
9 was given in confidentiality -- in confidential -- sorry -- the
10 confidential pitch that was provided with Mr. Abhyanker's
11 information about his business plans and so the entire CD
12 really relates to Trade Secrets.

13 THE COURT: But not to the two Trade Secrets that are
14 at issue now in this counterclaim necessarily?

15 MS. NORTON: It --

16 THE COURT: Well --

17 MR. PULGRAM: But, your Honor, their point is they
18 already gave it to Benchmark. I mean, it's not as though this
19 hasn't been provided to someone before. We'll trade it EAO
20 (phonetic). We're fine with that.

21 THE COURT: All right. I'm going to order it
22 produced for attorneys' eyes only at this point.

23 The third issue pertains to supplemental verified
24 responses. Is that a form problem that certain things were
25 included, but not pursuant to a verified interrogatory

1 response?

2 MR. PULGRAM: Yeah. There was back and forth in the
3 correspondence. And I -- we had a little progress actually
4 since our meet and confer on a couple issues and this may be
5 one where I think if we identified them; we want you to verify
6 this, this, this, this, and this; we think those are responsive
7 interrogatories; then we'll be able to have a universe of
8 information that we think actually needs to get put in a
9 verified response rather than a letter.

10 We'll highlight those points for them; and unless they
11 disagree that those are related to the interrogatory, we think
12 they should be included in the response.

13 THE COURT: Right. Why don't meet -- why don't you
14 do that; meet and confer. As long as there's not a relevancy
15 problem, seems to me it's fair to back up whatever those sort
16 of facts are with the verification.

17 MS. NORTON: It will be a help if they'll provide the
18 specific facts they want us to include. There may be a
19 relevancy problem, but I'm happy to meet and confer about it
20 and see if we can resolve the issue.

21 THE COURT: All right. Good.

22 And the last one pertains to documents relating to the
23 transfer between various entities.

24 And now, what's the relevance of that?

25 MR. PULGRAM: Mr. Abhyanker claims that he has rights

1 in the FatDoor Mark, which belonged to FatDoor. He also claims
2 that he has rights in the Nextdoor -- the term Nextdoor, which
3 we believe he represented to Benchmark way back when was part
4 of his FatDoor pitch.

5 We want the documentation that relates to his transfers of
6 those marks. They've produced two documents so far and a
7 number haven't been produced. And none of the correspondence
8 relating to the two that have been produced has been found. We
9 don't have any e-mail on this as with other things.

10 But one thing in particular that is an example of where we
11 think we haven't gotten things; FatDoor changed its name after
12 Mr. Abhyanker. It became Center'd. And there is a transfer
13 that we have seen signed by Mr. Abhyanker purporting to act on
14 behalf of Center'd -- the company that he was not with because
15 it changed the name after he left -- purporting to inside to
16 himself Center'd's rights in the term FatDoor.

17 We want to know how on Earth he got the right to act on
18 behalf of Center'd to take what were the company's rights that
19 he had left and conveyed to himself and we no documentation of
20 that.

21 Another example is where -- at the time that FatDoor was
22 first set up, Mr. Abhyanker claims that he carved out certain
23 rights in Nextdoor and held them himself; and that there were
24 documents that explained this that were created at that time
25 and provided to a specific guy, Mr. Warren. We don't have

1 those communications.

2 So, I mean, these are things that are, you know, legally
3 binding and operative documents that were created in the time
4 that we still haven't been provided.

5 THE COURT: Okay. What's your response?

6 MS. NORTON: Some of the things that they're asking
7 for don't exist. There simply may not be correspondence
8 surrounding the transfer from Center'd Corporation to
9 Mr. Abhyanker, but we have produced what is in his possession
10 and control and what he's been able to locate.

11 THE COURT: Are you saying that you produced
12 everything that's responsive that's within his possession,
13 control, and custody?

14 Well, then what I think is fair because it sounds like
15 there's some apparent holes where would one expect some
16 documents is to do the same kind of verification to state what
17 was searched, how it was searched, and do that under
18 verification to give some assurance that the search was
19 thorough; and in fact, everything that's responsive has been
20 produced. And if it's not there, it's not there. What else --

21 MR. PULGRAM: Understood.

22 THE COURT: Verification of search process; and
23 again, verification.

24 All right. So it sounds like the next step is to hear
25 those motions, which we will hear in February. We'll set that

1 as a status date as well.

2 In terms of scheduling, based on the -- what I've seen
3 here, I'm inclined to set this for trial on December -- is that
4 1st or 9th?

5 (Whereupon there was a discussion off the record.)

6 THE COURT: 1st or 9th. I can't -- December 1st,
7 yeah -- which gives you until June 12th as a nonexpert
8 discovery close.

9 MR. PULGRAM: And do the rest of the dates fall off
10 the Rules or --

11 THE COURT: I will include that in my scheduling
12 order that -- you know, I have a template.

13 So pretrial conference would be in -- on November 18th;
14 last day to hear dispositive motions would be September 4th;
15 and I have a whole thing about when you have to meet and confer
16 and everything else; close of expert discovery in July.

17 So that will all fall out. I'll provide you with that.

18 MR. PULGRAM: May I ask just one question?

19 THE COURT: Yeah.

20 MR. PULGRAM: How long for rebuttal expert reports?
21 Sometimes, we see three weeks; sometimes we see a month. And
22 my experience is a month is almost always required.

23 THE COURT: Well, I usually give three weeks. Exert
24 disclosure is June 12th; rebuttal July 3rd; and close of expert
25 discovery July 24th.

1 You can stipulate to extend that a bit; particularly, if
2 that doesn't interfere with any summary judgment motion.

3 Frankly, I don't care. My main thing is I need to hear any
4 summary judgment motion by that day and I've got to have time
5 to resolve it in time for you to meet and confer in preparation
6 for the pretrial conference.

7 So these other dates, I don't mind some slippage as long as
8 it doesn't affect the dates that you're here and the hearing
9 dates.

10 MR. PULGRAM: Well, I would just suggest maybe as a
11 beginning, we do July 11th instead of July 3rd and that would
12 still give us almost two weeks to complete expert discovery
13 after that and not have to move any other dates; if that's
14 acceptable with Benchmark?

15 MR. RAWLINSON: Yes.

16 THE COURT: All right. We'll change that one.

17 MR. PULGRAM: It's not a Saturday.

18 THE COURT: Nope. Well, I assume that it's not.

19 And let me last -- let me last ask; I know you've had a
20 settlement conference with Judge Vadas and it didn't settle; is
21 there a juncture that you foresee where it might be useful to
22 regenerate ADR efforts and or whether you want to try a
23 different forum?

24 MS. NORTON: From our point of view, probably not
25 until after the dispositive motions are resolved.

1 THE COURT: Okay.

2 MR. PULGRAM: We'll have a first set of those in
3 February so we probably will want to look up then and see where
4 things are.

5 THE COURT: All right. Well, I'll probably raise it
6 anyway as I always do and see if something has changed at that
7 point. Okay. All right. Thank you.

8 MR. PULGRAM: Thank you for your time.

9 THE COURT: Thank you.

(Proceedings adjourned at 12:00 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

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